Nos. 17-965

In the

Supreme Court of the United States

DONALD J. TRUMP, ET AL.,

Petitioners,

v.

STATE OF HAWAII, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE EBLAL ZAKZOK, SUMAYA HAMADMAD, FAHED MUQBIL, JOHN DOE #1, AND JANE DOES #2–3 IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICI CURIAE[1]

Amici curiae Eblal Zakzok, Sumaya Hamadmad, Fahed Muqbil, John Doe #1, and Jane Does #2–3 (Zakzok Amici) respectfully submit this brief in support of Respondents.

The Zakzok Amici are named plaintiffs in the case *Zakzok* v. *Trump*, No. TDC-17-cv-02969 (D. Md. filed Oct. 6, 2017), who sought and obtained a preliminary injunction against the enforcement of Proclamation 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017), Pet. App. 121a–148a. *International Refugee Assistance Project* v. *Trump*, 265 F. Supp. 3d 570 (D. Md. 2017). The Fourth Circuit affirmed the preliminary injunction on Establishment Clause grounds. *International Refugee Assistance Project* v. *Trump*, 883 F.3d 233 (4th Cir. 2018) (*IRAP*). On February 23, 2018, the Zakzok Amici joined with the other respondents in *IRAP* v. *Trump* in filing a petition for a writ of certiorari, No. 17-1194. On March 12, 2018, the Government filed a cross-petition, No. 17-1270.

This case confronts the same government policy at issue in the Zakzok Amici's pending petition. The interests of the Zakzok Amici in this case are the direct harm that they suffer as a result of President

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[1] Pursuant to Supreme Court Rule 37.6, the amici curiae certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amici or their counsel, has made a monetary contribution to its preparation or submission. Petitioners granted blanket consent for the filing of amici curiae in this matter. Amici curiae requested and received the consent of Respondents' counsel of record. This brief does not purport to represent the position of NYU School of Law.

Trump's official disfavor of Muslims, and the danger to the safety and security of their family members who, as a result of Petitioners' actions, are indefinitely prohibited from entering this country.

SUMMARY OF ARGUMENT

The Zakzok Amici are Muslim residents of the United States who have seen their lives upended and their families torn apart by the Proclamation. They submit this brief to emphasize facts in the record before the Fourth Circuit that are relevant to the Court's consideration of whether the Proclamation complies with the Establishment Clause.

Below, they describe in personal terms the Proclamation's discriminatory impact, and the irrationality of its nationality-based restrictions.

Their stories sharply repudiate the Government's characterization of the President's statements, his Proclamation, and the effect of his attack on their families and their faith.

ARGUMENT

I. The Constitution Prohibits Violations Of The Establishment Clause That Stigmatize Members Of A Religious Faith

This Court has observed that the "clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson* v. *Valente*, 456 U.S. 228, 244 (1982). This basic tenet "is so well understood, that few violations are recorded in [this Court's] opin-

ions." *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 523 (1993).

The President, by "showing a purpose" to disfavor Muslims, has sent the message to American Muslims, including the Zakzok Amici, "that they are outsiders, not full members of the political community," to which they belong. *McCreary Cty.* v. *American Civil Liberties Union of Ky.*, 545 U.S. 844, 860 (2005) (quoting *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 309–310 (2000)) (internal quotations omitted). The resulting "[f]eelings of marginalization and exclusion" experienced by American Muslims "are cognizable forms of injury * * * because one of the core objectives of modern Establishment Clause jurisprudence has been to prevent the State from sending" precisely the sort of stigmatizing message broadcast by the Proclamation. *Moss* v. *Spartan Cty. Sch. Dist. Seven*, 683 F. 3d 599, 607 (4th Cir. 2012), cert. denied, 568 U.S. 101 (Nov. 13, 2012).

The experience of the Zakzok Amici is representative of American Muslims across the country. They have been branded outsiders by the Proclamation, which has deprived them of the security of religious freedom. While these harms are partially the result of having family members indefinitely barred from entering this country, they are also a consequence of the message of intolerance that the President—through the Proclamation—has sent directly to American Muslims, irrespective of whether the Proclamation excludes their relatives from Muslim-majority countries. Their injuries are direct, personal, and devastating.

A. The Zakzok Amici Have Experienced Marginalization And Stigma As A Result Of The Proclamation

The Zakzok Amici have experienced isolation, marginalization, and stigma as a result of the Proclamation and the actions taken by Petitioners. Those injuries are detailed in the declarations submitted in support of their motion for a preliminary injunction in *Zakzok* v. *Trump*, No. TDC-17-cv-02969, Dkt. 6 (D. Md. Oct. 10, 2016).

1. *Jane Doe #3*

Jane Doe #3 is a United States citizen who legally immigrated to the United States from Somalia as a refugee in 2006.[2] She fled the wars that consumed her country of birth. She passed the citizenship test in 2012, and became an American citizen.

Jane Doe #3 feels that the Proclamation was motivated by a desire to stigmatize Muslims. Despite being entitled to the same rights and legal protections as any other United States citizen, the Proclamation makes her feel like a second class citizen on the basis of her Muslim faith.

Since the executive orders and the Proclamation were announced, Jane Doe #3 has noticed people treating her differently. When people learn she is from Somalia, they send her hurtful messages on social media and question her legal status. She is

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[2] See C.A. App. at 1268–1269, *IRAP*, 883 F.3d 233 (4th Cir. 2018) (No. 17-2231).

afraid to travel because she fears that she will be subject to extensive scrutiny or questioning based on the place of birth listed on her passport. This makes her feel isolated, separated, and treated differently from her fellow citizens.

2. *John Doe #1*

John Doe #1 is a United States citizen of Syrian descent who resides in New Jersey and holds a Master's Degree from Rutgers University.[3] He married a Syrian national in August 2017, and the Proclamation now stands between him, his wife, and their future together in the United States.

John Doe #1 is suffering because the Proclamation is separating him from his wife. But the fact that his Muslim faith is the reason they cannot be together only compounds his anguish. The Proclamation makes him feel discriminated against as a practicing Muslim. He feels that the Proclamation singles out his country of origin in order to target Muslims, and that it is motivated by bigotry and hatred. He is aware that countries that failed to comply with the purported "baseline criteria" were not banned under the Proclamation,[4] which reinforces his belief that his country of origin, Syria, was singled out because of its large Muslim population. He believes that the President and the Proclamation

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[3] *Id.* at 1259–1262.

[4] The Fourth Circuit made a similar observation. See *IRAP*, 883 F.3d at 269 ("[T]he criteria allegedly used in the review to identify problematic countries lie at odds with the list of countries actually included in the Proclamation.").

send a message that encourages anti-Muslim sentiment, and empowers those seeking to discriminate against Muslims. He feels he is treated differently from other Americans because their spousal relationships are not being similarly disrupted.

3. *Jane Doe #2*

Jane Doe #2 is a United States citizen of Syrian descent.[5] As a result of the Proclamation, she and her mother, who also lives in the United States, are separated from her father, a Syrian national living in Kuwait.

Jane Doe #2 feels that the Proclamation discriminates against her as a Muslim. She was naturalized as an American citizen and understood that the Constitution protects people and the rights of religious minorities. Keeping Muslim families apart, and targeting Muslim-majority countries for exclusion from the United States, does not accord with what she was led to believe about her adopted country. She knows that hurting her family because of their Muslim faith is not what the Constitution is about.

4. *Dr. Sumaya Hamadmad*

Dr. Sumaya Hamadmad is a United States citizen of Syrian descent.[6] She obtained her Ph.D. in pharmacology from the University of Iowa in 2006,

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[5] See C.A. App. at 1263–1267, *IRAP*, 883 F.3d 233.

[6] *Id.* at 1254–1258.

and received a postdoctoral fellowship from Yale University.

She feels that the Proclamation is an attack on her Islamic faith and all Muslims. She is afraid for the safety of herself and her family, because she believes that the United States no longer embraces people of different backgrounds.[7]

The Proclamation makes her worry about the future of American Muslims and the country. Dr. Hamadmad thinks she would not have been able to obtain her PhD if the Proclamation had been in effect when she arrived, and she fears for all the other scientists, engineers, doctors, and graduate students who will not have the same opportunity.

5. *Fahed Muqbil*

Fahed Muqbil is a United States citizen of Yemeni descent.[8] Mr. Muqbil and his wife, a Yemeni national, have two daughters, both of whom are United States citizens. One of Mr. Muqbil's daughters suffers from spina bifida, a debilitating birth defect. Mr. Muqbil brought his daughter to the United States in May 2017 to receive treatment for her

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[7] There has been a well-documented increase in anti-Muslim hate crimes since the executive orders were issued. *E.g.* Amicus Br. Hussam Ayloush et al. at 9–19, *International Refugee Assistance Project* v. *Trump*, 138 S. Ct. 353 (2017) ("[T]he issuance of the travel ban has coincided with an unprecedented 91 percent surge in hate crimes against Muslims in the United States through June 2017.").

[8] See C.A. App. at 1244–1248, *IRAP*, 883 F.3d 233.

worsening condition. But until recently, Mr. Muqbil's wife was unable to enter the United States as a result of the Proclamation. Mr. Muqbil's daughter went through multiple surgeries and was critically ill, but her mother was unable to help care for her as a result of the Proclamation.

While Mr. Muqbil's wife has since been admitted to the United States, her entry has not undone the pain of those nine months, diminished Mr. Muqbil's feelings of marginalization, or dissipated the stigma he experiences from being vilified because of his faith. His wife's entry into the United States did not undo the message sent to Mr. Muqbil—that his family, his wife, and their two daughters would be made to suffer as an expression of the President's disfavor towards his faith.

The Proclamation also makes Mr. Muqbil feel like he and his fellow American Muslims are unwanted, different, and somehow dangerous merely because of their religion. He believes it paints him and his family as terrorists, and he feels condemned and penalized merely for practicing Islam. Mr. Muqbil said that the Proclamation rendered him a second class citizen because of his faith, and resulted in the treatment of his wife as a "national security threat," instead of a mother who just wanted to care for her family.

II. The Travel Ban's Stated Purpose Is Pretext For An Intent To Exclude Muslims

The Zakzok Amici's stories—and the experiences of others like them—are the Proclamation's in-

tended effect. Although the Proclamation purports to be in the interest of "national security," even a cursory review of its terms shows the stated purpose to be mere pretext. Further, the President's statements about the Proclamation make it clear that the intention is to discriminate against Muslims. The anxiety that the Zakzok Amici feel when confronted with the fact that their family members may never be able to join them in the United States is "inexplicable by anything but animus towards the class it affects." *Romer* v. *Evans*, 517 U.S. 620, 632 (1996).

A. Nationality Lacks Predictive Value

The nationality-based ban the Proclamation imposes is not a reasonable or logical way to address the "risks" to the United States that are supposedly the reason for the ban.[9] The experiences of the Zakzok Amici illustrate why this is so.

Amicus Sumaya Hamadmad's sister, Dima, provides one example of how the ban imposed by the Proclamation is both misdirected and ill-advised. Dima is an academic who has been invited to collabo-

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[9] The Government's arguments that the Proclamation is premised on nationality-based national security concerns echo arguments made more than a century ago, before the enactment of legislation and the many decisions of this Court that reject institutionalized discrimination on the basis of race, religion, and national origin. Cf. *Chae Chan Ping* v. *United States*, 130 U.S. 581, 606 (1889) ("If therefore, the government * * * considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed.").

rate on her research by Yale University and the University of Florida. Dima was born to Syrian parents, but she was born and has lived in Jordan her entire life and *has never visited Syria*. Because of the nature of Jordanian citizenship, Dima is not a Jordanian citizen, but rather inherited Syrian citizenship from her parents. While the Proclamation cites the current conditions in Syria as the exclusive rationale for banning travel by Syrian nationals, the Proclamation bars individuals like Dima simply because of their heritage, notwithstanding the fact that Dima has never had any contact with the conditions in Syria. Curiously, however, the Proclamation would permit Dima to enter the United States if her countries of ancestry and residence were reversed: a *Jordanian* citizen who immigrated to Syria during the civil war would not be denied entry into the United States by the Proclamation.[10]

Amicus John Doe #1 is separated from his wife and stepdaughter because they are Syrian nationals, despite the fact that they were born and raised in Saudi Arabia. His wife currently resides in Portugal, where she is obtaining a degree in dentistry. His stepdaughter is currently a permanent resident of Saudi Arabia, where she lives with her grandparents, though that status is set to expire this year. Despite the absence of any past or present physical

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[10] After the *Zakzok* lawsuit was filed, Dima was permitted to temporarily enter the United States on a B1/B2 visa for a mixed business and tourist purpose. See *IRAP*, 883 F.3d at 254 n.1. Sumaya Hamadmad's father-in-law's visa application remains pending. *Ibid.*

connection to Syria, their status as Syrian nationals now stands in the way of their reunion.

Amicus Dr. Eblal Zakzok's story similarly highlights the arbitrariness of the Proclamation. After the Syrian regime subjected Dr. Zakzok to detention and torture, he fled to Turkey and then sought and was granted asylum in the United States. Dr. Zakzok's wife and four of his five children were eligible for and received derivative asylum benefits, and have immigrated to the United States. Dr. Zakzok's eldest daughter was too old (21 years) to receive derivative asylum benefits. Her immigration application remains pending. She has not been to Syria in over three years, having fled the country on account of the Syrian regime's threat to her family.

But the Proclamation will indefinitely ban Dr. Zakzok's daughter from the United States. And it will do so on the basis of the same connection to Syria shared by Dr. Zakzok and the rest of his family, who are already in the United States. The Syrian regime victimized them all. They fled together. And the United States approved their permanent legal residency, *notwithstanding their contact with the conditions in Syria*—except for Dr. Zakzok's eldest daughter, who was not beyond the Proclamation's discriminatory attack on her faith.

B. President Trump Has Said That The Purpose Of The Travel Ban Is To Exclude Muslims

The Proclamation communicates an anti-Muslim sentiment, not just because it is arbitrary and facially inconsistent with its stated purpose, but also because President Trump has explicitly stated

that it is his intention, through the Proclamation, to exclude Muslims from this country. President Trump has further indicated his personal and political disfavor of Muslims through personal statements or statements of his advisors.

Many of these statements have been chronicled by Respondents, Br. 6–12, and the Fourth Circuit, *IRAP*, 883 F.3d at 266–268, and for that reason we do not repeat them all here. We do, however, wish to note certain of those statements to rebut the Government's characterization of the Fourth Circuit's findings in *IRAP*.

The Government accuses the Fourth Circuit of engaging in "judicial psychoanalysis," and provides two examples of post-election remarks it considered. These examples include what it terms a "passing remark" by the President at the signing of EO-1 that "[w]e all know what that means," and statements by presidential aides that the "basic policy outcomes" of EO-1 and EO-2 were the same. Br. 67–68.

This argument grossly mischaracterizes the material the Fourth Circuit relied upon when it found an "objective observer could conclude that the President's repeated statements convey the primary purpose of the Proclamation—to exclude Muslims from the United States," and that it was "hard to imagine how an objective observer could come to any other conclusion." *IRAP*, 883 F.3d at 268.

The two remarks the Government cited are not what made it difficult for the Fourth Circuit to see any other conclusion—it was the President's unrepentant insistence on his intent. The Government fails to provide any exculpatory explanation for the

following post-election statements considered by the Fourth Circuit:

i. President-elect Trump, "asked about 'his plans to create a Muslim register or ban Muslim immigration to the United States,' replied, 'You know my plans all along, and I've proven to be right, 100 percent correct.'" *Id.* at 266 n.15.

ii. The day after EO-1 was signed "Rudy Giuliani, an advisor to President Trump, explained that EO-1's *purpose* was to discriminate against Muslims." *Id.* at 266.

iii. On August 17, 2017, "the President endorsed an apocryphal story involving General Pershing and a purported massacre of Muslims with bullets dipped in a pig's blood, advising people to '[s]tudy what General Pershing . . . did to terrorists when caught. There was no more Radical Islamic Terror for 35 years!'" *Id.* at 267.

iv. "On November 29, 2017, President Trump retweeted three disturbing anti-Muslim videos entitled: 'Muslim Destroys a Statue of Virgin Mary!' 'Islamist mob pushes teenage boy off roof and beats him to death!' and 'Muslim migrant beats up Dutch boy on crutches!'" *Ibid.* The "three videos were originally tweeted by an extremist political party whose mission is to oppose 'all alien and destructive politic or religious doctrines, including . . . Islam.'" *Ibid.*[11]

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[11] The leaders of the political party (Britain First) were recently convicted and sentenced to prison for hate crimes in

The Fourth Circuit found that these three videos made it especially difficult for an objective observer to conclude that the Proclamation was not targeting Muslims. They did not need to "psychoanalyze" the President to link the anti-Muslim animus in the videos to the Proclamation. The "President's own deputy press secretary made this connection" for them. *Id.* at 268.

While the Government may wish to disregard the litany of statements by President Trump in this regard as "passing statements" or with other vague remarks, the Zakzok Amici, as American Muslims, have been forced to come to terms with how these remarks, and the President's actions, have affected their family and their ability to practice their religion and participate in American society. The statements of the President and administration officials have contributed to the stigma and marginalization felt by the Zakzok Amici, and reinforce their understanding of the Proclamation as official government disfavor of their religious faith.

These statements have not been disputed, retracted, revised, or corrected—which perhaps is why the Government ignores them. They are official statements from the White House. This Court does not need to engage in psychoanalysis to determine whether the Proclamation is intended to exclude Muslims from the United States—it can simply take the President's words at face value.

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the U.K. Kevin Rawlinson, *Britain First leaders jailed over anti-Muslim hate crimes*, The Guardian (Mar. 7, 2018), https://goo.gl/1iRF5Y.

III. The Zakzok Amici Have Suffered Other Significant Harm As A Result Of The Proclamation

The Proclamation has also harmed the Zakzok Amici by interfering with their most intimate personal relationships and family plans, and creating economic and other hardship for these American citizens and permanent residents.

The Government has contended that such injuries "do not stem from alleged infringement of [a citizen or resident's] own Establishment Clause rights." Pet. Br. 27–28. This premise—that a person is not directly injured by harms inflicted on their own family—is incorrect as a matter of fact and law. Few things are more intimate than that "ancient and universal human institution." *United States* v. *Windsor*, 570 U.S. 744, 809 (2013) (Alito, J., dissenting). Similarly, this Court observed that "[t]he first bond of society is marriage; next, children; and then the family." *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2594 (2015) (quoting Cicero, *De Officiis* 57 (W. Miller transl. 1913)).

The harm that the Proclamation inflicts upon the Zakzok Amici, their families, and others similarly situated because of their religion is antithetical to these principles. Upholding this thinly veiled attempt to eliminate a minority religious population would be an insult to the most foundational elements of society.

1. ***Dr. Eblal Zakzok***

Dr. Eblal Zakzok, his wife, and four of his five children are in the United States.[12] But Dr. Zakzok's eldest daughter remains in Istanbul, having fled Syria, but unable to reunite with her family in the United States because of the Proclamation.

Dr. Zakzok's family is distraught at the prospect of being indefinitely or permanently divided. Dr. Zakzok fears for his daughter's safety in Istanbul, where he believes Syrian women are often targeted by criminals. He also is concerned that his daughter—who is ineligible for permanent residency status in Turkey—may be required to return to Syria, where she would risk being detained and tortured. This is not mere speculation—Syrian forces arrested, detained, and tortured Dr. Zakzok for two weeks before he was released and fled Syria with his family.

Finally, the Proclamation causes economic strain for Dr. Zakzok's family. If his daughter is banned from entry, her education will be imperiled (she was accepted to the Ohio State University). And her ability to contribute to their family life will be undermined. Meanwhile, Dr. Zakzok must also continue to help support his daughter in Istanbul while the family waits to find out if she will be permitted to join her family in the United States.

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[12] See C.A. App. at 1249–1253, *IRAP*, 883 F.3d 233.

2. *John Doe #1*

John Doe #1 is a Syrian national living in the United States.[13] In August 2017, he married his wife, also a Syrian national, who was born and raised in Saudi Arabia. John Doe #1 has one child, a nine-year-old stepdaughter, who is his wife's biological daughter and also a Syrian national. His stepdaughter lives in Saudi Arabia with her grandparents, where her permanent residency status will expire in 2018.

Shortly after their wedding, John Doe #1's wife left the United States for Portugal to complete her Master's degree, while John Doe #1 prepared to apply for her to immigrate to the United States on the basis of their recent marriage. The Proclamation indefinitely suspends those plans.

Since the Proclamation, John Doe #1 has felt anxious, depressed, and helpless. He believes that the Proclamation threatens his relationship with his wife. He now realizes that he may never be joined by his wife and step-daughter in the United States, or be afforded the opportunity to create the family they envisioned. He has no other family in the United States, and the possibility of indefinite separation has left him distraught.

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[13] *Id.* at 1259–1262.

3. *Jane Doe #2*

Jane Doe #2 is a United States citizen of Syrian descent.[14] She is married with two children. Following the birth of her first child in 2016, Jane Doe #2's mother joined her in the United States. Jane Doe #2's father, however, remained in Kuwait, where he continues to work in order to support the family. Now, as her father approaches retirement, he plans to join his daughter, wife, and grandchildren in the United States. The United States has previously authorized Jane Doe #2's father to enter the United States on tourist visas on multiple occasions.

The Proclamation would bar Jane Doe #2's father from entering the United States—purportedly because of conditions in Syria—even though he has not been inside Syria in more than 20 years.

Jane Doe #2's separation from her father causes her tremendous anguish. Apart from the anxiety created by the fragmentation of her family, she fears for her father's safety. Jane Doe #2 and her husband are politically active members of the Syrian American Council—an organization that advocates for a free and democratic Syria. As her father nears retirement, he may be forced to leave Kuwait, where he has a work-based visa. If her father has to retire but is unable to join his family in the United States, he may be forced to return to Syria, where he could face grave personal risk as a result of Jane Doe #2's political activities.

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[14] *Id.* at 1263–1267.

CONCLUSION

The experiences of the Zakzok Amici show the heart-wrenching effect of government-sanctioned discrimination. This is not the promise of the United States and its Constitution: this country has always aspired to carefully guard religious freedom and held itself out as welcoming immigrants who commit to upholding our institutions and ideals from all parts of the world.

The Government's limitless vision of an unreviewable executive power is not the law—it is the absence of it. *Boumediene* v. *Bush*, 553 U.S. 723, 798 (2008) ("The laws and Constitution are designed to survive, and remain in force, in extraordinary times.").

The injuries suffered by the Zakzok Amici are beyond the pale. If they are beyond the power of the courts to remedy, we fear for what is yet to come.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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